Steven Muss, Cynthia Muss Lawrence and Debbie Muss Keshen, a Co-Partnership, d/b/a Alexander Muss & Sons *and* Local 32B-32J, Service Employees International Union, AFL-CIO and Local 72, International Industrial Production Employees Union, Party to the Contract

Tower Owners Incorporated, as alter ego and/or Successor to Steven Muss, Cynthia Muss, Lawrence Muss and Debbie Muss Keshen, a Co-Partnership d/b/a Alexander Muss & Sons *and* Local 32B-32J, Service Employees International Union, AFL-CIO and Local 72, International Industrial Production Employees Union, Party to the Contract

Local 72, International Industrial Production Employees Union *and* Local 32B-32J, Service Employees International Union, AFL-CIO and Stephen Muss, Cynthia Muss Lawrence and Debbie Muss Keshen, a Co-Partnership, d/b/a Alexander Muss & Sons, Party to the Contract. Cases 29-CA-9701, 29-CA-10754, and 29-CB-4908

29 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 9 July 1984 Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent Alexander Muss & Sons filed a brief in response.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order

We agree with the judge that the Respondent Employer acted lawfully when it withdrew recognition from Local 32B-32J and recognized and executed a collective-bargaining agreement with Local 72 as the representative of its unit employees.[1] In doing so we rely on the fact that 15 of 17 of the employees once represented by Local 32B-32J had been on strike for over a year; that all the strikers had been permanently replaced; and that 13 of 17 current employees had freely signed cards authorizing Local 72 to represent them, but had given no indication of support for Local 32B-32J. On these facts, we agree that the Respondent Employer had objective considerations sufficient to establish a good-faith doubt of the incumbent Local 32B-32J's majority status We also agree with the judge that the Respondent, having lawfully withdrawn recognition from the incumbent and no election petition having been filed, was free to recognize an unassisted and uncoerced majority union based on authorization cards.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] We note that this withdrawal, a necessary precursor to recognition of Local 72, was not specifically alleged as an unfair labor practice

[2] Compare *Signal Transformer Co*, 265 NLRB 272 (1982), wherein an election petition had been filed, thereby raising a question concerning representation

Chairman Dotson and Member Dennis did not participate in *RCA Del Caribe, Inc*, 262 NLRB 963 (1982), on which the Board relied in part in *Signal Transformer* They express no view here on whether *RCA Del Caribe* was correctly decided or on the judge's discussion of it

Member Hunter finds it unnecessary to pass on the judge's discussion of *Laystrom Mfg Co*, 151 NLRB 1482 (1965)

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on September 19, 1984, and February 6, 1985. The complaint in Cases 29-CA-9701 and 29-CB-4908 alleges that Respondent Muss, the owner of Seacoast Towers, has had a series of collective-bargaining agreements with Local 32B-32J, that Local 32B-32J is the representative of Muss' employees, that the employees began a strike on February 5, 1981, which continues to the present, that Muss recognized Local 72 on February 9, 1982, and signed a collective-bargaining agreement with Local 72 on February 26, 1982, containing a union-security provision, that a real question concerning representation existed when the Local 72 contract was signed and that Respondents Muss and Local 72 have violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act. The complaint in Case 29-CA-10754 alleges further that Respondent Tower Owners Incorporated became the owner of Seacoast Towers on July 5, 1983, that Muss and Tower Owners are alter egos and that Tower Owners is a successor of Muss. The cases were consolidated on December 2, 1983.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by Muss and Tower Owners and by Local 72, in April 1984, I make the following

FINDINGS OF FACT

I. BACKGROUND

It is undisputed that Respondent Muss was engaged in the operation of residential apartment buildings called Seacoast Towers in Brooklyn, New York, and that it annually derived gross revenues in excess of $500,000 and purchased over $50,000, annually, indirectly in interstate and foreign commerce.[1] Respondent Muss admits and I

[1] On July 5, 1983, Seacoast Towers was converted to cooperative ownership and the buildings are now owned by Tower Owners Incorporated The implications of this conversion will be discussed below

find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is undisputed, and I find, that Local 32B-32J and Respondent Local 72 are labor organizations within the meaning of Section 2(5) of the Act

II. ALLEGED UNFAIR LABOR PRACTICES

A *The Facts*

Hyman Cohen is managing agent of Seacoast Towers.[2] Cohen testified that the collective-bargaining agreement between Seacoast Towers and Local 32B-32J expired December 31, 1980 Collective-bargaining negotiations were not fruitful and a strike of the employees began February 5, 1981. At that time, all but 2 of the 17 unit members walked off the job The last negotiations between Seacoast Towers and Local 32B-32J took place in March 1981, in the presence of a mediator Since March 1981, the Union has made no demand for negotiations and has not sought to represent employees in grievances However, Seacoast Towers has received a few letters demanding pension and welfare fund payments from the Union the last such request was received in March 1982, at which time Cohen instructed the employer's attorneys to respond that the Union was no longer the bargaining agent for the employees.

Cohen testified that permanent replacements for the employees were hired gradually beginning in April 1981; there was a full complement of employees on the payroll by October 1981. None of these new hires were former striking employees

Cohen testified that Local 32B-32J picketed Seacoast Towers until December 1981, at first picketing was for 7 days per week and then it was reduced to 3 or 4 days beginning in fall 1981. Cohen's affidavit shows that after this time, and until at least March 1982, picketing occurred mainly for a few hours on Wednesdays. Occasionally the pickets were in a car on a street not adjacent to Seacoast Towers but in a location where anyone driving out of Seacoast Towers would necessarily see them. In addition, certain Muss properties in Florida were picketed from December 1981 to March 1982 in connection with the strike at Seacoast Towers in Brooklyn.

Cohen's affidavit states that when Lawrence Litman, an agent of Local 72, first approached him in early February 1982, about representing the employees, Cohen informed him that there was a union on the premises and that the Union was on strike. Litman told Cohen that he had authorization cards from the employees, and Cohen examined the cards. Cohen questioned some of the employees as to whether they had signed voluntarily They replied that they had and that they wished coverage for medical insurance benefits. Cohen recognized the Union on February 1i, 1982 A 3-year contract, providing an 8-percent raise each year and certain other benefits, was signed on February 26, 1982, with an effective date of March 1.

Lawrence Litman, president of Local 72, testified as to his efforts to organize the employees of Seacoast Towers and as to the negotiation of a collective-bargaining agreement Since his testimony and affidavit are consistent with Cohen's testimony, I shall not summarize them I note, however, that Litman's affidavit states that Cohen told him that "he had another union " Litman responded that this was of no moment since there was no contract with the other Union Litman never observed any pickets at Seacoast Towers at any time according to both his testimony and his affidavit

Serge Jean-Jacques is a business agent of Local 32B-32J He had no responsibilities relating to Seacoast Towers until March or April 1981, at which time he was assigned to check the pickets at Seacoast Towers Jean-Jacques testified that he checked the pickets 7 to 5 times per week and saw two shifts of picketers, for a total of 8-10 picketers. They were near Seacoast Towers on 14th Street In February 1982, a picketer told him there was another union at Seacoast Towers He could not remember how many days a week his people were picketing then, probably a minimum of 5 days. There were no specific days specified for picketing to take place At this time, there was only one shift of pickets from 8 a.m to 3:30 or 4 p m. The men picketed on 14th Street, but their cars were parked on 15th Street. They walked back and forth and they all wore picket signs On September 19, 1983, there were four pickets· Laguerre, Alhouote, Baulemon, and Little. All were employed before 1981. Jean-Jacques paid picket money to the picketers every Wednesday

Joseph Laguerre was employed at Seacoast Towers as a doorman and went on strike in February 1981 He testified on direct examination that he has picketed up to the day before the trial began. In 1981, there were 2 shifts per day for 7 days per week The picketing changed to 6 hours per day for 5 days per week when they heard from tenants that there was a new union at Seacoast Towers. There were are four men picketing with signs The pickets were on both 15th and 14th Streets. Jean-Jacques came every day On cross-examination, Laguerre stated that for "a long time" the pickets had been on 15th Street, that is in a location not adjacent to Seacoast Towers However, they put picket signs on poles on 14th Street near Seacoast Towers.

B. *Discussion and Conclusions*

Based on the testimony of all the witness and Cohen's affidavit, I find that the striking employees were picketing at Seacoast Towers at the time Local 72 was granted recognition and a contract executed It seems that the picketing was not as vigorous as it had been, but Cohen's affidavit is clear that he knew there were Local 32B-32J picketers still picketing when he recognized Local 72. Cohen told Litman that there was a union and that it was on strike. Moreover, Local 32B-32J had intermittently made demands for fund contributions and payments up to March 1982.

The General Counsel urges that the Board's recent decision in *Signal Transformer Co.*, 265 NLRB 272 (1982), is dispositive of the issues raised by this case The General Counsel urges that a question concerning representation existed when Seacoast Towers recognized Local 72.

[2] I have supplemented Cohen's testimony with his affidavit given to a Board agent on April 14, 1982

The employer was aware of Local 32B-32J's claim to represent the employees as the incumbent union, and under these circumstances it could not recognize and sign a contract with Local 72.

I note that no election was sought in this case. I note further that there has been no allegation that, aside from the continuing claim of Local 32B-32J, there was any illegality in the recognition of Local 72 relating to the signing of the cards or proof of majority.

In *Bruckner Nursing Home*, 262 NLRB 955 (1982), the Board announced a new policy, departing from the *Midwest Piping* rule of strict employer neutrality.[3] The facts in *Bruckner* were that two rival unions were attempting to organize a unit of 125 employees. A card count revealed that Local 1115 had obtained two authorization cards, while Local 144 was determined to have cards from 80 to 90 percent of the unit employees. The employer executed a contract with Local 144 and Local 1115 filed charges with the Board. The judge found that Local 1115 had a "colorable claim" to representation based on its continuous organizing efforts and the two authorization cards, this constituted a question concerning representation and the signing of the contract was held to violate Section 8(a)(2) In reversing, the Board set forth the difficulties of applying the *Midwest Piping* rule a colorable claim is hard to define; the rule gives minority unions time to organize; the circuit courts did not approve of the rule, preferring instead a rule of the "unassisted majority", and the rule frustrated employee desires The Board held that it would henceforth not find a violation in initial organizing campaigns where the employer recognizes an unassisted majority union before a petition for election is filed The benefits of the new rule, as enumerated by the Board, are that it is clear and that a union with only minimal support cannot frustrate employee desires Finally, the Board cautioned that once a petition is filed, the employer must maintain strict neutrality Where a petition is filed, dual authorization cards have often been signed Further, once Board procedures have been invoked, parties must avoid circumventing them

In a companion case to *Bruckner*, the Board decided *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982). In this case, the employer and the IBEW were signatories to a contract expiring in 1975. Negotiations for a successor agreement began in 1974, these were not successful and a strike was conducted from January 9 to February 26, 1975 On January 27, 1975, the Independent Union filed a representation petition and the employer thereafter refused to negotiate After the IBEW obtained a majority of signed cards, negotiations resumed and a new contract was signed February 26 between the employer and the IBEW. In deciding the unfair labor practice case that resulted, the Board stated that the rule in *Shea Chemical*[4] requiring strict neutrality and a cessation of bargaining once an outside union files a petition was contrary to the presumption of continuing majority status of an incumbent. Instead, the Board held, the mere filing of a representation petition should not require strict neutrality toward the incumbent The employer may still bargain with the incumbent unless it withdraws recognition based on "other objective considerations." In this way, the incumbent will not be artificially stripped of its status and industrial peace and stability will not be destroyed. The Board pointed out that the ultimate fate of the two unions and the new contract would depend on the results of the election. With respect to the question of objective considerations, the Board cited *Celanese Corp*, 95 NLRB 664 (1951) (union loss of economic strike constitutes objective evidence that replacements were not union members), and *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965) (new employees are presumed to support the union in proportion to old employees unless there is independent evidence that the new employees do not support the union).

In *Signal Transformer*, the case relied on by the General Counsel, bargaining for a new contract between the employer and the IUE failed because the membership rejected the proposed settlement. A strike ensued during which the unit employees removed the IUE business agent, called in the Teamsters, and changed all their picket signs to mention the Teamsters instead of the IUE. The Teamsters Union filed a representation petition. The employer recognized the Teamsters upon proof that 124 out of the 130 unit employees had withdrawn from the IUE and 118 of the employees had signed cards for the Teamsters. Relying on the *RCA Del Caribe* case, supra, the Board held that it was not a violation to withdraw recognition from the incumbent in good faith where the employer had objective evidence that 124 of the 130 unit employees had repudiated the incumbent IUE. However, the Board held that it was a violation to recognize the Teamsters because a valid representation petition had been filed.

In the instant case, the strike began on February 5, 1981. Two of the 17 unit employees did not strike. By October 1981 the Employer had lawfully replaced the striking employees. On February 26, 1982, when Seacoast Towers recognized Local 72, it had objective evidence that its employees did not support Local 32B-32J: The two oldest employees had never joined the strike and 13 of the 17 unit employees had just signed cards for Local 72. Thus, although Local 32B-32J was still asserting a claim by picketing sporadically, it was not a violation for the Employer to withdraw recognition from Local 32B-32J based on *RCA*, and *Signal Transformer*.

Nor do I find that it was a violation for the Employer to recognize Local 72 and conclude a collective-bargaining agreement containing union-security provisions. No representation petition had been filed, so the neutrality rule of *Bruckner, RCA, Signal Transformer*, was not invoked. Moreover, the employer's actions in the instant case vindicated the policies enunciated in *Bruckner* and *RCA* Those cases made it clear that the Board will foster the employees' choice of bargaining representative. Here, 13 of the 17 employees favored Local 72 and none had given any sign that they favored Local 32B-32J. The Board in the two above-cited cases also strongly favored a rule promoting industrial stability. Here, the recognition of Local 72 and the subsequent signing of the

[3] 63 NLRB 1060 (1945)
[4] 121 NLRB 1027 (1958)

contract established the representation status of the unit and gave the employees the benefits they had lacked and had been seeking when they contacted Local 72 The existence of a contract providing wage rates and regular increases, various benefits, and a means of resolving disputes must certainly be seen as promoting industrial peace and stability.

C. *Status of Tower Owners*

Since I have found that no unfair labor practices have been committed, it is not necessary to decide the allegations of the consolidated complaint relating to the status of Tower Owners.

CONCLUSIONS OF LAW

1 Respondent Alexander Muss & Sons is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 32B-32J Service Employees International Union, AFL-CIO and Local 72 International Industrial Production Employees Union are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents Muss, Tower Owners, and Local 72 did not violate the Act as alleged in the complaint

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

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[5] If no exceptions are filed as provided by Sec 102 46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102 48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes